United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

BRIEF FOR APPELLANT

In the

UNITED STATES COURT OF APPEALS

For the District of Columbia Circuit

959

JOSEPH J. REIGLE	:	No. 18,422
vs.	:	September Term, 1963
UNITED STATES	:	

Appeal from a Judgment of the United States District Court for the District of Columbia

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Appointed by the Court of Appeals

STATEMENT OF QUESTIONS PRESENTED

The questions presented by this case are:

1. In a prosecution for unauthorized use of an automobile, must the Government show that the use of the automobile by the defendant was without the consent of the owner, or is it sufficient merely to show that such use was without the consent of a relative of the owner who had customarily driven the automobile?

2. Where the evidence in an unauthorized use case shows that at the time of its removal the automobile was in the custody of persons other than those named in the indictment as having custody, should the indictment be dismissed, or, at the least, should the Judge instruct the jury that in order to convict they must find that the defendant's use of the automobile was without the consent of the persons actually shown to be the custodians?

3. Is it reversible error for a Judge to fail to instruct the jury to ignore a statement by a witness, not based on his personal knowledge, that a defendant charged with unauthorized use "stole" or "took" the automobile in question?

4. Does the rule concerning evidence tending to show that the defendant has committed crimes other than the one with which he is charged require exclusion,

in an unauthorized use case, of testimony that the defendant attempted to sell articles from another automobile shortly before being found in possession of the automobile involved in the unauthorized use charge?

5. When a defendant charged with unauthorized use of an automobile admits the use, but produces evidence that such use had been authorized by a person he believed to be the lawful custodian of such automobile, is it error for the Judge to fail to instruct the jury that if they believe that evidence they must acquit the defendant, even if defendant's belief that he was authorized was erroneous or unreasonable?

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In the

UNITED STATES COURT OF APPEALS

For the District of Columbia Circuit

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BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

The jurisdiction of this Court is invoked under the Act of June 25, 1948, c. 646, 62 Stat. 929, 12 U.S.C. § 1291. Appellant was convicted on December 5, 1963 of the crime of unauthorized use of an automobile under 22 D. C. Code § 2204, and was sentenced on January 31, 1964. Appellant filed a timely Notice of Appeal on February 3, 1964, and his petition to proceed on appeal without prepayment of costs was granted on February 4, 1964.

STATEMENT OF THE CASE

Sometime during the night of September 16-17, 1963, a 1962 Chevrolet, Maryland registration No. CH 5579, disappeared from a parking lot at 909 E Street, N.W., Washington, D. C. This automobile was found in the appellant's possession at approximately 11:30 p.m. on September 17, 1963, in the District of Columbia, together with another automobile, a 1962 Pontiac. The Pontiac was also allegedly a stolen car, although for reasons which shall appear no proof of this was introduced at the appellant's trial.

On October 21, 1963 the appellant was indicted by a District of Columbia grand jury for unauthorized use of the Chevrolet (first count) and of the Pontiac (second count). The case was tried before Judge Hart and a jury on December 5, 1963. The Judge dismissed the second count of the indictment on the ground that it failed to state a crime (Tr. 11-13). The appellant was tried on the first count, was convicted, and on January 31, 1964

was committed to the custody of the Attorney General pursuant to 18 U.S.C. § 5010(b), known as the Federal Youth Correction Act. Since that time he has been confined in the District of Columbia Youth Center, Lorton, Virginia.

The evidence showed that the 1962 Chevrolet, for the unauthorized use of which the appellant was convicted, was the property of one Jonas Jakubauskas, a resident of Baltimore, Maryland (Tr. 14, 16). The automobile was generally used by Mr. Jakubauskas' daughter, Miss Jina Herbert. Miss Herbert testified that she had not given the appellant her consent to drive the car (Tr. 21-22). Miss Herbert was asked whether to her knowledge her father had given any one permission to use the car on the day in question (Tr. 22). This question was objected to, and was withdrawn by counsel for the prosecution upon a ruling by the Court that it would be "sufficient," apparently for conviction, to show that Miss Herbert had given no one permission to use the car (Tr. 22).

The indictment charged that the automobile had been in the custody of Jina Herbert and William W. Smith.

The evidence showed that Miss Herbert had on the morning of September 16 left the automobile at the parking lot from which it was taken at least eleven hours thereafter (Tr. 17, 76-77). She did not subsequently use or see the car until after its recovery. William W. Smith is the operator of a number of parking lots, including that at 909 E Street, N.W. Mr. Smith, however, did not have custody of the automobile in question on September 16, 1963 and does not remember seeing the car on that day or even whether he visited the lot in question on that day (Tr. 29). The undisputed testimony showed that Miss Herbert left the car in the custody of a parking lot attendant, one John G. Evans, who had a key to the automobile and drove it on that day (Tr. 66-68). Mr. Evans was at the parking lot from 7:45 a.m. to 6 p.m. on September 16 (Tr. 67). Mr. O. C. Smith, who also testified, worked at the parking lot from 11 a.m. to 7 p.m. on that day, and, after Mr. Evans left at 6 p.m., O. C. Smith had sole custody of the automobile, to which he had a key and which he drove (Tr. 73-76).

It was testified that, at about 11:30 p.m. on the night of September 17, the appellant drove a

Pontiac (the car as to which the indictment against him was dismissed) to a service station at 4635 South Capitol Street and proposed to the operator, Robert Gandy, to sell him the radio from that car (Tr. 37-38). Appellant said something to the effect that he also had a Chevrolet. An employee of Mr. Gandy's, William H. Smith, drove appellant to the place where the Chevrolet was parked, and appellant drove the Chevrolet back to the service station (Tr. 38-40, 49-52). On returning to the service station, appellant was arrested by a police officer, Ronald A. Clarke (R. 59-61). According to Mr. Gandy, appellant on being confronted by the officer stated that he had stolen the automobile (R. 42), but Officer Clarke contradicted this, stating that appellant denied having stolen the car (Tr. 61-63).

Mr. Gandy testified not only concerning the Chevrolet but also concerning the Pontiac, although the prosecuting attorney subsequently stated to the Court that he had warned all the witnesses not to mention the Pontiac (Tr. 57). William H. Smith, during his testimony, said that he had first seen the appellant "about two or three months before the time, you know, he stole -- I

mean took the car" (Tr. 54). The Judge did not instruct the jury to disregard either of these pieces of testimony.

The appellant's testimony was that, at about 7:30 on the evening of September 16, he had a conversation in the District of Columbia with one Lewis Edward Fair and one Eddie Hall. Hall said that his uncle had lent him an automobile, which was parked a block away, and appellant asked Hall if he could borrow the car. Hall assented, describing the car and its location and saying he would not give the appellant the key because it was on a chain with his house key, but would leave the ignition on so that the appellant could operate the car. About 11:30 that night, the appellant found the car on Park Place, S.E., where Hall had said it was, and drove it to his apartment on Hadley Terrace, S.E., parking it overnight around the corner from that address. The next night, that of September 17, the appellant had been drinking (Tr. 92, 102) and decided that he would "play a game" (Tr. 93) on Hall (against whom he had a grudge) by selling the radio from the car. There followed the events leading to his arrest.

The appellant's testimony that he had been authorized to use the Chevrolet by Hall, who said that

it belonged to his uncle, was corroborated in every respect by the testimony of Lewis Edward Fair (Tr. 83-88), who stated that, as the appellant testified, he had been present when Hall authorized appellant to drive the car.

The appellant is 20 years old.(He was 19 when the alleged crime was committed). He was abandoned by his mother at the age of 6, and thereafter lived in various foster homes and as a ward of the Welfare Department.

STATUTES INVOLVED

22 D. C. Code § 2204:

> "Unauthorized use of vehicles.
>
> "Any person who, without the consent of the owner, shall take, use, operate, or remove, or cause to be taken, used, operated, or removed from a garage, stable, or other building, or from any place or locality on a public or private highway, park, parkway, street, lot, field, inclosure, or space, an automobile or motor vehicle, and operate or drive or cause the same to be operated or driven for his own profit, use, or purpose shall be punished by a fine not exceeding one thousand dollars or imprisonment not exceeding five years, or both such fine and imprisonment. (Mar. 3, 1901, ch. 854, § 826b, as added Feb. 3, 1913, 37 Stat. 656, ch. 23, § 1.)"

STATEMENT OF POINTS

1. The case should have been dismissed at the close of the Government's evidence because the prosecution failed to introduce any evidence bearing on an essential element of the crime, that is, whether the owner of the automobile had consented to its use by the appellant.

2. The proof was at essential variance with the indictment in showing that the automobile was not in the custody of Jina Herbert and William W. Smith, but was, rather, in the custody of John G. Evans and O. C. Smith, and appellant was prejudiced by such variance.

3. The appellant was prejudiced by the failure of the Judge to instruct the jury to ignore an opinion or hearsay statement by a witness that the appellant "stole" or "took" the automobile.

4. The Judge erred in allowing testimony tending to show that the appellant had committed another crime, and appellant was prejudiced thereby.

5. The Judge erred in failing to instruct the jury that, if they believed the testimony that the

appellant had been authorized to drive the automobile by one whom he believed to be the owner or custodian thereof, he should be acquitted even if such belief were erroneous or unreasonable.

SUMMARY OF ARGUMENT

1. It is undisputed that the owner of the automobile involved in this case is one Jonas Jakubauskas. However, he did not testify, and no evidence whatever was introduced as to whether he had consented to appellant's driving the automobile. The Judge ruled that it was sufficient for the Government to show that the appellant did not have the consent of the owner's daughter, who had driven the car from Baltimore to Washington on the morning of the day it was taken. This ruling was erroneous.

2. The proof clearly showed that at the time the automobile was taken it was in the custody, not of Jina Herbert and William W. Smith, as charged in the indictment, but rather in the custody of John G. Evans

and O. C. Smith. This variance should have led to dismissal of the indictment. At the very least, the Judge should have instructed the jury that, in order to find that the appellant did not have the implied consent of the owner, they were required to find that the appellant did not have the consent of Evans and O. C. Smith, the actual custodians.

3. A witness, William H. Smith, was allowed to testify that the appellant "stole" or "took" the automobile, a matter as to which he had no knowledge whatever. For this testimony to be received without a direction to the jury to ignore it was highly prejudicial to the appellant.

4. While the indictment contained two counts, the second count, charging unauthorized use of a Pontiac, was dismissed for failure to state a crime, and the witnesses were warned not to mention the Pontiac in their testimony. However, one of the witnesses, Robert Gandy, was allowed to testify concerning the Pontiac in a manner that tended to show that the appellant had committed a crime other than that for which he was on trial.

This testimony was clearly not necessary and, under familiar principles, should have been excluded as prejudicial.

5. The Judge instructed the jury that the crime of unauthorized use consisted of knowingly using an automobile without the consent of the owner. He failed, however, to instruct the jury that consent of a person having custody could be construed as indicating the implied consent of the owner. He further failed to instruct them that, if they found that appellant believed he had the consent of a person having custody, that belief would negate the existence of criminal intent even if such belief was erroneous or unreasonable. Having received only the instructions which they did, the jury might well have believed the law to be that (1) consent of a person merely having custody cannot imply consent of the owner, or (2) that the consent of a person whom one believed to be the owner or custodian is not sufficient if that belief is in fact not correct, or (3) that such belief would in any case have to be a reasonable belief. Since these are all incorrect statements of law, and since each pertains to an issue involved in the case, the instructions were inadequate and the appellant was prejudiced thereby.

ARGUMENT

1. AN ESSENTIAL ELEMENT OF THE CRIME WAS NOT PROVED, IN THAT THERE WAS NO EVIDENCE THAT APPELLANT DID NOT HAVE THE CONSENT OF THE OWNER OF THE CAR.

With respect to point 1, appellant desires the Court to read pages 16-17 and 21-22 of the transcript.

The crime of which the appellant was convicted is the use of an automobile without the consent of the owner thereof. It is undisputed that the owner of the automobile here in question was Jonas Jakubauskas. Mr. Jakubauskas did not testify at the trial, and no evidence was introduced by the prosecution which bore in any way on whether he had consented to the appellant's use of his automobile. The prosecution attempted to ask the owner's daughter whether to her knowledge her father had given anyone his permission to use the car on that day, but after objection this question was withdrawn upon a ruling by the Court that it would be sufficient to show that the daughter, Miss Herbert, had not given permission.

The Judge thus apparently held that the jury could infer, from the fact that Miss Herbert had given no one permission to use the car, the fact that her father, the

owner, had not done so either. But this would be a wholly unwarranted inference, since the two conclusions are not even closely related to each other. Since the lack of the consent of the owner is an essential element of the crime, and since the Government introduced no evidence bearing on that element, the Judge should have dismissed the case at the close of the prosecution's evidence.

Since this is so, it is irrelevant that when the defense presented its evidence the appellant did not claim to have received permission to drive the car from Mr. Jakubauskas. That fact cannot serve to correct the error made previously, since the Government had the obligation to introduce evidence from which the jury could find each element of the crime to be present. Moreover, the mere fact that the appellant does not claim that he received permission directly from Mr. Jakubauskas does not make Mr. Jakubauskas's conduct immaterial. For example, for all that the record shows, Mr. Jakubauskas might have given permission to drive the car to Eddie Hall, who according to the testimony both of the appellant and of the witness Fair authorized the appellant to drive the car.

The case should, then, have been dismissed at the close of the Government's evidence for failure of proof of

an essential element of the case. At the very least, the Judge should have instructed the jury that the statute requires proof of lack of consent by the owner and that it was a question of fact for their determination whether lack of consent by the owner could be inferred from evidence showing lack of consent by the owner's daughter. Instead, the Judge foreclosed that issue by holding (Tr. 22) that it would be "sufficient" to show lack of consent by the daughter. The Judge apparently thus ruled that the jury was not only permitted, but <u>required</u>, to infer lack of consent by the owner from lack of consent by his daughter. This ruling was clearly erroneous and seriously prejudiced the appellant.

2. <u>THERE WAS A FATAL VARIANCE BETWEEN THE INDICTMENT AND THE EVIDENCE</u>.

With respect to point 2, appellant desires the Court to read pages 29-34, 66-69, and 73-78 of the transcript.

The indictment charged that the automobile was in the custody of Jina Herbert and William W. Smith and was used by appellant without their consent. However, the evidence showed that Miss Herbert had, at least eleven hours

before the car disappeared, left it in the custody of John G. Evans, and that William W. Smith did not even remember whether he had seen the automobile on that day. The evidence plainly showed that the automobile was in the sole custody of John G. Evans from prior to 8:00 a.m. to 11:00 a.m. on September 16 (Tr. 67-68); was in the joint custody of John G. Evans and O. C. Smith from 11:00 a.m. to 6:00 p.m. on that day (Tr. 67-74) and was in sole custody of O. C. Smith after that time (Tr. 71, 74-77). These men had a key to the car, drove it and moved it from place to place, and exercised full custody and supervision over it.

It is settled that "custody" means actual temporary physical control, immediate personal care and control, rather than some more indirect type of dominion. E.g., United States v. One Ox-5 American Eagle Airplane, 38 F.2d 106, 108 (W.D. Wash. 1930); State v. Johnson, 140 Conn. 560, 102 A.2d 359 (1954); State v. Jackson, 80 Ariz. 82, 292 P.2d 1075 (1956). Hence the proof varied from the allegations of the indictment, which should have been dismissed for that reason once the variance appeared.

This point is by no means a mere technicality. Mr Evans or O. C. Smith had given some one else consent to

drive the car, that person would probably not have been in violation of the statute. While both of these men denied that they gave any one such consent, they were examined only in a most perfunctory manner, and the jury was never informed of the possible significance of their conduct. At the very least, the jury should have been instructed that if they had any reasonable doubt that Evans or O. C. Smith had not given permission to use the car to the appellant--or to Eddie Hall--then the appellant should be acquitted.

Essential variances between indictment and proof are fatal to a prosecution principally because they infringe the principle that the accused must be definitely informed of the charges against him, or, as the Constitution provides, "the nature and cause of the accusation" (Amendment 6). Clyatt v. United States, 197 U.S. 207, 219-20 (1905); 5 Wharton, Criminal Law and Procedure § 2055 (1955). In the present case the appellant was informed that he was charged with taking a car from the custody of Jina Herbert and William W. Smith, while the proof at the trial showed that the car was taken by some one from the custody of Evans and O. C. Smith alone. This variance may well have hindered the appellant in the preparation of his case; had he known what the charge would be at trial, he might well have wished to

conduct a preliminary investigation into the character, record etc. of Evans and O. C. Smith, and particularly into whether they were acquainted with Eddie Hall. In the circumstances of this case it cannot be said with confidence that the variance was immaterial or that it did not prejudice the appellant.

3. THE JUDGE SHOULD HAVE DIRECTED THE JURY TO IGNORE A WITNESS'S REMARK THAT THE APPELLANT "STOLE" OR "TOOK" THE CAR.

With respect to point 3, appellant desires the Court to read page 54 of the transcript.

During the cross-examination of William H. Smith, the following transpired:

> "Q. How long have you known Mr. Reigle, Mr. Smith?
>
> A. I just seen him come in the gas station. I reckon about two or three months before the time, you know, he stole--I mean took the car."

The allegation that the appellant had stolen or taken the car was pure opinion or hearsay on the part of this witness, who had no personal knowledge whatever of how the appellant had obtained the car. The remark was clearly prejudicial to the appellant and could well have influenced the jury,

especially since they were never instructed not to be influenced thereby. The prejudice to the appellant was probably not serious enough to have required the declaration of a mistrial, but it surely required a direction by the Judge that the jury were to pay no attention to the remark and were not to be influenced by it. While no request for such a direction was made, it is submitted that the failure of the Judge to give it was plain error which requires reversal. Fed. R. Crim. P. 52(b).

4. THE JUDGE ERRED IN ADMITTING TESTIMONY TENDING TO SHOW THAT APPELLANT HAD COMMITTED ANOTHER CRIME.

With respect to point 4, appellant desires the Court to read pages 38-41, 48-50 and 57 of the transcript.

Robert Gandy was permitted to testify that the appellant came to his service station driving a Pontiac and offered to sell him the radio from that car. On Gandy's saying, "I got a Chevrolet," the appellant said he had a Chevrolet too and went to get it (Tr. 37-39). William H. Smith was also allowed to testify concerning the Pontiac (Tr. 50).

The appellant was not on trial for unauthorized use of the Pontiac, that charge having been dismissed

because the second count of the indictment failed to state a crime. Therefore, under familiar principles, evidence bearing on unauthorized use of the Pontiac was inadmissible and should have been excluded. "The general rule... is that evidence of other offenses than that for which the accused is on trial is inadmissible." Hodge v. United States, 75 App. D.C. 332, 126 F. 2d 849 (1942). The Judge was award that this principle of exclusion applied here, since before the police officer who arrested the appellant was examined the Judge called counsel to the bench and asked counsel for the prosecution: "Have you warned this policeman not to say anything about the Pontiac?" The answer was: "Yes, I have told--I told all the witnesses that they were not to mention it" (Tr. 57). However, Mr. Gandy had already been allowed to testify that the appellant offered to sell him the radio from the Pontiac, which clearly tended to suggest that the appellant had stoken that car or was using it without authorization.

It is true that if two crimes are so intertwined that evidence of one cannot be disentangled from evidence of the other, the rule may sometimes have to be relaxed. Dowling Bros. Distilling Co. v. United States,

153 F.2d 353 (6th Cir.), cert. denied, 328 U.S. 848 (1946).[1/] That was not at all the case here, however, as shown by the examination of the police officer, which was limited to facts concerning the Chevrolet without any impairment of clarity. The same technique could easily have been employed with Mr. Gandy. Instead of exploring all the events that transpired from the time the appellant first came to Mr. Gandy's service station with the Pontiac, counsel for the prosectuion could simply, after establishing that the appellant was at the service station, have begun by asking if anything was said concerning a Chevrolet and continued with the events from that time on.

1/ This Court has held that evidence of other criminal acts may be admitted "when those acts (1) are so blended or connected with the one on trial that proof of one incidentally involves the other, (2) they explain the circumstances of the offense charged, or (3) they tend logically to prove any element of that offense." Fairbanks v. United States, 96 App. D.C. 345; 226 F.2d 251, 253 (1955). While the evidence concerning the Pontiac might be argued to fall within one or more of these exceptions, it is submitted that since it would have been so easy to exclude that evidence here without any impairment of the clarity or coherence of the proof concerning the Chevrolet, the exclusionary rule should have been applied here to avoid the obvious prejudice to the appellant.

Evidence tending to show commission of a crime other than the one at issue is so prejudicial that even an instruction to the jury to disregard it is not sufficient. E.g., Sang Soon Sur v. United States, 167 F.2d 431 (9th Cir. 1948). A mistrial should have been declared, therefore, as soon as the statements concerning the Pontiac had been made.

5. THE JUDGE ERRED IN FAILING TO INSTRUCT THE JURY THAT IF THEY BELIEVED THE TESTIMONY THAT APPELLANT HAD BEEN TOLD BY EDDIE HALL THAT HE COULD USE THE CAR, THEY SHOULD RETURN A VERDICT OF ACQUITTAL.

With respect to point 5, appellant desires the Court to read pages 83-104 and 111-114 of the transcript.

The appellant's defense was that one Eddie Hall told him that the car in question belonged to his (Hall's) uncle, who had lent it to Hall; that the appellant asked Hall for permission to use the car, and that Hall gave such permission. The appellant's own testimony to this effect was collaborated by the evidence of Lewis Edward Fair, who testified that he was present and heard the conversation. Plainly, if the jury believed this testimony they should have acquitted the appellant, since he would have lacked the criminal intent necessary for conviction.

In his instructions, the Judge told the jury that one of the elements of the crime was "that at the time the defendant used, operated or removed the vehicle he knew that he did not have the consent of the owner to use, operate or remove the vehicle" (Tr. 112). The Judge did not instruct the jury, however, that such knowledge would not

exist if the appellant believed that he had the consent of one who was, as it was testified that Eddie Hall claimed that he was, in lawful custody of the automobile. The Judge did not, further, instruct the jury that a belief that one has the consent of a lawful custodian, even though such belief were erroneous or perhaps unreasonable, would negative criminal intent and that if the jury found that such a belief existed they should return a verdict of acquittal.

It is submitted that on the facts of this case the Judge had an obligation, even absent any special requests for instructions, not to confine himself to abstract and perfunctory instructions, but to apply the law to the facts as alleged by the respective parties. The Judge's failure to do so may have seriously misled the jury as to the law which they should apply, and his failure therefore prejudiced appellant.

The appellant never contended that he had the direct and express permission of the owner of the car to use it; he claimed, rather, that he had the permission of one who represented himself to be, and whom he believed to be, the lawful custodian and the owner's nephew. In the

absence of any guidance from the Judge other than the words of the statute, which refer to "the consent of the owner," the jury might well have believed that the appellant's defense was insufficient as a matter of law, since he did not allege that he had such direct and express consent.

Moreover, the jury might have believed that as a matter of law the appellant had an obligation to investigate whether Hall's uncle was the real owner, or that if the appellant's belief was erroneous, or one that they would consider unreasonable or ill-founded, it would not constitute a valid defense. The jury should have been charged that, if they found that the appellant really believed the car belonged to Hall's uncle, they should have acquitted the appellant without regard to the reasonableness of that belief. The jury might well have also been instructed that, in assessing whether the appellant truly held a belief even though such a belief would have appeared unreasonable to them, they should take into consideration his age and apparent background and experience.

This is a case, then, where the instructions left the jury without any firm guidelines or principles, and were susceptible to so many misinterpretations and

misunderstandings that this Court cannot exclude the real possibility that the jury believed the testimony in favor of the appellant and yet considered it an insufficient defense as a matter of law. There may be cases where perfunctory instructions couched in the words of the applicable statute plus abstract statements of a few general principles are sufficient. The present case is distinctly not one of them. This Court should require that the instructions be such as genuinely to apprise the jury of the legal principles necessary to resolve the case at issue, and not to leave the door wide open to as many possibilities of error and misunderstanding as were present here.

The charge should not leave the jurors to conjecture as to what constitutes the offense charged. Morris v. United States, 156 F.2d 525 (9th Cir. 1946). It is the duty of the Judge to "array the evidence for the benefit of the jury and declare and explain the law applicable thereto, not in abstranct propositions, but in terms which the jurors can understand." Heller v. United States, 104 F.2d 446 (4th Cir. 1939). A defendant is entitled to instructions covering his theory of the case if there is evidence to

support it. Meadows v. United States, 65 App. D.C. 275, 82 F.2d 881 (1936); McAffee v. United States, 70 App. D.C. 142, 105 F.2d 21,26 (1936). Here the Judge simply ignored the appellant's theory, though there was ample evidence to support it, and simply left the jury to conjecture as to whether or not the theory was an adequate defense in law. This was fatal error.

CONCLUSION

For the reasons stated, the appellant requests that his conviction be reversed and that, if the Court agrees with the appellant as to point 1 or point 2 of appellant's Points on Appeal, the indictment be dismissed, or, if the Court agrees only with one or more of points 3, 4, and 5 of appellant's Points on Appeal, the case be remanded to the District Court for a new trial.

Respectfully submitted,

Brice M. Clagett
Attorney for Appellant
Appointed by the Court of Appeals

BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,422

JOSEPH J. REIGLE, *Appellant*,

v.

UNITED STATES OF AMERICA, *Appellee*.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

DAVID C. ACHESON,
United States Attorney.

FRANK Q. NEBEKER,
MARTIN R. HOFFMANN,
Assistant United States Attorneys.

QUESTIONS PRESENTED

1. In a trial for unauthorized use of an automobile, should the trial judge have directed acquittal of appellant at the close of the government's case because the title owner of the car did not testify, where (1) there was abundant physical evidence of an unpermitted taking of the machine, (2) none of the rightful custodians had consented to removal of the car from the lot, and (3) defense counsel made no motion for acquittal, either at the end of the government's case or at the close of all the evidence?

2. Where the instructions given in the trial court were correct and complete, and where requests for instructions were made, should the case now be reversed because no specific instruction was given that if the jury believed appellant's story they must acquit him?

3. Was omission from the indictment of the names of two parking lot attendants who were the final rightful custodians of the stolen car fatal to the prosecution, where the offense charged was clearly stated and appellant was not impaired in making his defense?

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* Cases chiefly relied upon are marked by asterisks.

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,422

JOSEPH J. REIGLE, *Appellant*,

v.

UNITED STATES OF AMERICA, *Appellee*.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

Appellant's possession of two stolen cars, a Pontiac and a Chevrolet, led to his arrest on September 17, 1963. One count of a two-count indictment was dismissed at the start of trial on December 5, 1963. The jury by their verdict found appellant guilty of unauthorized use of the Chevrolet auto, subject of the first count. 22 D.C.C. 2204. This appeal followed imposition of sentence under the Youth Correction Act. 18 U.S.C. 5010(b).

Dismissal of the Pontiac count of the indictment followed voir dire and selection of the jury. The trial judge ruled *sua sponte* that the indictment did not state a crime, since it stated the auto had been taken *with* the consent of two agents of the owner corporation (Tr. 11-13). The trial proceeded on the remaining count.

Evidence was not disputed that appellant—driving the Pontiac—had arrived at a gas station managed by witness

Gandy, whose employees at the time included the witness William H. Smith[1] (Tr. 36-37, 39, 50). Appellant offered first to sell the radio out of the Pontiac he was driving; Gandy's evasive reply that he (Gandy) owned a Chevrolet rather than a Pontiac drew from appellant the information that appellant also had a Chevrolet, which he was willing to go and get (Tr. 37-38, 101-102). The witness William H. Smith took appellant to the alley in which the Chevrolet was parked and saw him drive it back to the station (Tr. 50-52, 54-55, 93-94, 102). Upon his return with the second machine, appellant offered to sell the Chevrolet radio and spare tire; the genuineness of the latter proposal was illustrated by appellant's attempts to kick the trunk open (he had no key for the car) (Tr. 39-41, 52-53).

According to Gandy, appellant admitted the theft of the Chevrolet (Tr. 42). Appellant sought to allay any fears that purchases of the accessories might be detected by police by pointing out to Gandy—overheard by Smith—that "When we get through selling the parts [from the cars] we burn them" (Tr. 39, 54). On cross-examination of Gandy, appellant's trial counsel first emphasized the attempted sale of the Pontiac radio; then—apparently prompted by his client—he asked questions which elicited the information that Gandy had reasons to believe appellant shouldn't be in the Pontiac (Tr. 43, 45-46).

The police officer testified that appellant told him someone had given him five dollars to drive the car (Tr. 62). The officer testified that the Chevrolet had been "hot-wired"; there was testimony that the interior of the car had been damaged, and that two hubcaps and the door to the glove compartment were missing (Tr. 20-21, 63).

The Chevrolet was titled to Baltimorean Jonas Jakubauskas, though he never drove it (Tr. 16). He owned it for the use of the complainant, his daughter Jina Herbert, who used it regularly in commuting between Baltimore and

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[1] The government at trial forged its case in part on the testimony of three Smiths: William H. Smith, the filling station attendant; William W. Smith, manager of the parking lot from which the Chevrolet disappeared; and O. C. Smith, a parking lot attendant.

Washington (Tr. 15). As was her custom, she had left it on the morning of September 16 at a lot operated by William W. Smith; it was from this lot that the car inexplicably had disappeared sometime between 7 p.m. on September 16 and 8 a.m. on September 17, having been locked for the night (Tr. 17-19, 26-27, 68, 76-77). No one—complainant, Smith or either of Smith's employees—had given appellant or anyone else permission to use the Chevrolet (Tr. 21-23, 28-29, 68-69, 78); Jakubauskas did not testify at trial; no motion for acquittal followed the close of the government's case, or the end of all the testimony (Tr. 82-83, 104-106).

Appellant's trial explanation of his possession of the auto—corroborated by a friend—was that an acquaintance named Hall had offered loan of it to him at 7 p.m. on September 16; Hall said it was his uncle's car and told appellant where it was parked; thus appellant claimed not to know it was stolen (Tr. 86, 89-91). Appellant explained his offers to sell accessories from both cars at the filling station as his way of joking,[2] and said he didn't recall making the remark about burning the cars—he had been drinking at the time—although he "might have" made such a statement (Tr. 92, 102-103).

The charge to the jury included instructions on credi-

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[2] In discussing the sale of the Pontiac radio appellant was "just kidding" Gandy, the offeree; the attempts to sell the Chevrolet appurtenances were a "joke" on—and "game" with—Hall, because Hall had previously had appellant picked up for jaywalking (Tr. 93, 97, 101). His further explanations were equally unconvincing. Appellant said he actually did not know Hall well enough to know if he had an uncle or not; he had known Hall "a long time," but Hall was "not a friend he could trust" (Tr. 91, 96, 99, 100). The day following Hall's offer to appellant of the auto's use—the day after the car had been stolen—appellant had seen Hall on a bus, but not until he saw him again that evening did he tell Hall he had actually borrowed the machine (Tr. 100). Only after arrest and confrontation with the fact that the car was "hot-wired" did appellant realize for the first time the car was stolen; he was unwilling to state to the police that "that guy" (apparently Hall) had left him the car, since he "didn't want to shift the weight to someone else." (Tr. 103).

bility of witnesses, elements of the crime, and on the government's theory of the case, that guilt allowably might be inferred from appellant's unexplained possession of a recently stolen motor vehicle (Tr. 106-114).

Following delivery of these instructions defense counsel was asked if he wished an instruction which would direct the jury to disregard the remarks made in voir dire about the Pontiac. Defense counsel emphatically stated "No, and I don't think anything more need be said about it" (Tr. 114). Counsel were asked if they had any further suggestions, and none were forthcoming (Tr. 114-115). The jury then retired to deliberate and duly returned their guilty verdict.

STATUTE AND RULE INVOLVED

Title 22, District of Columbia Code, Section 2204, provides:

> Any person who, without the consent of the owner, shall take, use, operate, or remove, or cause to be taken, used, operated, or removed from a garage, stable, or other building, or from any place or locality on a public or private highway, park, parkway, street, lot, field, inclosure, or space, an automobile or motor vehicle, and operate or drive or cause the same to be operated or driven for his own profit, use, or purpose shall be punished by a fine not exceeding one thousand dollars or imprisonment not exceeding five years, or both such fine and imprisonment.

Rule 52, Federal Rules of Criminal Procedure, provides:

> (a) *Harmless Error.* Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.
>
> (b) *Plain Error.* Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.

SUMMARY OF ARGUMENT

Having failed to move for a judgment of acquittal at any time in the court below, appellant is precluded from raising on appeal questions of the sufficiency of the evidence. But even were this not so, the abundance of evidence of unlawful appropriation of the automobile and compelling proof of appellant's unauthorized use of the car were sufficient nearly conclusively to prove his guilt, let alone adequate to require him to put forth his defense.

In the absence of requests at trial, errors of omission from the trial court's charge should not be noticed by this court. The instructions given were correct and complete. The jury was clearly given to know that the defense offered by appellant, if accepted, would require his acquittal. The charge afforded the proper guidance for their deliberations on whether to believe him or not.

Appellant can show no substantial impairment of his rights stemming from the variance between the indictment and the government's proof. Knowledge that two parking lot attendants last had custody of the car before the theft had nothing whatever to do with the defense he offered at trial, which was that he had borrowed the car from an acquaintance and thought he had authority to use it. Nor is there any possibility he could again be put in jeopardy for this crime. Absence of prejudice and the insignificance of the discrepancy require affirmance, especially since the variance was never called to the attention of the court below.

ARGUMENT

I. The trial judge was not required to direct acquittal of appellant at the close of the government's case

(See Tr. 17-19, 21-23, 26-29, 36-43, 45-46, 50-54, 63, 68-69, 76-78, 82-83, 104-106, 114-115)

The central issue in the case was whether appellant knew he was not authorized to use the Chevrolet machine. In this appeal, he urges that an essential element of the crime —nonconsent of the owner—was not proved because Jonas

Jakubauskas (title-holder of the auto) was not called by the government at the trial. Since there was no evidence introduced which "bore in any way" on whether Jakubauskas "had consented to the appellant's use of the automobile", appellant concludes the judge should have dismissed the case for failure of proof of an essential element of the crime (Br. 12-14).

Appellant concedes—as he must—that testimony of the owner is not mandatory to proof of his non-consent. In fact, an unconsented taking may be established by circumstantial evidence in the absence of even a custodian's testimony. *Allen* v. *United States*, 192 F.2d 570 (5th Cir. 1951). The question here presented is a question of the sufficiency of the evidence, not a technical defect in the government's proof. And appellant's appeal on this point must conclusively fail, first because it was not preserved for appellate review, and secondly because there was overwhelming evidence that no consent had been given by the owner.

Failure to move for a judgment of acquittal precludes reversal based on questions of sufficiency of the evidence. *Corbin* v. *United States*, 253 F.2d 646, 647 (10th Cir. 1958); *Picciurro* v. *United States*, 250 F.2d 585 (8th Cir. 1958); *Battle* v. *United States*, 92 U.S. App. D.C. 220, 206 F.2d 440 (1953). No motion was made—or even suggested—after the government rested its case (Tr. 82-83). Even had appellant so moved, a second motion at the close of all the evidence would be required to preserve the sufficiency point. No such second motion was made (Tr. 104-106). For an appellant's advancing his defenses after denial of a motion to acquit waives the motion, precluding appellate review. *Corbin* v. *United States, supra; Hall* v. *United States*, 83 U.S. App. D.C. 166, 169, 168 F. 2d 161, 164, *cert. denied*, 334 U.S. 853 (1948); *Ladrey* v. *United States*, 81 U.S. App. D.C. 127, 130, 155 F.2d 417, 420, *cert. denied*, 329 U.S. 723 (1946). Thus a proper evaluation of sufficiency proceeds on an assessment of all the evidence in the case. See *Ladrey* v. *United States, supra.*

But even had he made motion testing the government's case and preserved the point, denial would needs be sus-

tained by this Court. The evidence must be assessed on appeal in the light most favorable to the government, making allowance for the jury's evaluation of the credibility of the witnesses before them and their justification in making warranted inferences of fact from the evidence adduced in the courtroom. *Glasser* v. *United States*, 315 U.S. 60, 80 (1942); *Curley* v. *United States*, 81 U.S. App. D.C. 389, 160 F.2d 229, *cert. denied*, 324 U.S. 875 (1947).

By these standards, the government's case unquestionably would have dictated denial of a motion for acquittal. The circumstances of the car's disappearance alone would require a jury to find an unpermitted taking. The locked car disappeared after the parking lot closed, no attendant having seen or given anyone permission to take it or furnished its key; the complainant, relying on the auto to commute home to Baltimore, had given no one permission or the key to use it; and—inferably—the complainant had not been notified by her father that he had undertaken to loan anyone the car in circumstances when such notification would certainly have followed if not logically preceded a proper bailment; the car—when recovered—was found to have been hot-wired (Tr. 17-19, 21-23, 26-29, 63, 68-69, 76-78). But there was more food for jury thought (and inference).

In the posture in which the case stood when the government rested, the jury had been treated to testimony of appelant's own behavior which belied any authority he might have. His confession to the gas station attendant that he stole the auto; his possession of the Chevrolet as his second car;[3] and actions indicating unpermitted custody (its

[3] Appellant argues separately that the testimony of several witnesses pertaining to the Pontiac auto—the indictment as to which was dismissed by the trial judge—was erroneously admitted, and was prejudicial to him, since it clearly tended to suggest that the appellant had stolen the car, or was using it without authorization (Br. 19). He relies on the general rule that proof of crimes other than those on trial is inadmissible citing *Fairbanks* v. *United States*, 96 U.S. App. D.C. 345, 226 F. 2d 251 (1955). But the testimony in question was emphasized by appellant's own counsel on cross-examination; no motion to strike it was made (Tr. 43). Desire

location parked in an alley, lack of ignition key, offers to sell accessories, attempts to kick open the trunk and appellant's remark indicating that after stripping the car, he would burn it) all proclaimed unauthorized use (Tr. 36-43, 45-46, 50-54). It is submitted that the government's proof would compel a finding that Jakubauskas had not permitted the car to leave the lot, much less authorized it be operated by appellant. At very least the prosecution case was sufficient to put appellant to proof that his operation was with the owner's authority or at least without knowledge he had no authority. The defense offering did nothing more—in the main—than confirm the proof offered by the government of the unpermitted taking of the auto.

II. The trial court's instructions were complete and correct

(Tr. 54, 104-115)

Appellant's next claim to reversal is that an instruction should have been given that the jury must acquit him if they believed his testimony. Without this instruction, the jury was misled—he claims—on what law they should apply, and they may have considered—he speculates—appellant's defense inadequate as a matter of law, though they accepted his story (Br. 20-23).

No such request was made below, either prior to or following the charge (Tr. 104-106, 114-115). The issue thus is

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for instruction to the jury at the trial's end that they must disregard mention of the Pontiac indictment was affirmatively disavowed by appellant's counsel (Tr. 114-115). Moreover, proof of the stolen character of the Pontiac and appellant's design to sell accessories from it would have been completely proper—as an exception to the above general rule—to prove appellant's design to steal and strip cars. It thus was competent proof that the Chevrolet was knowingly used improperly by him. *United States* v. *Welborn*, 322 F. 2d 910 (4th Cir. 1963); *Williams* v. *United States*, 272 F. 2d 40 (8th Cir. 1960) (relying on and applying an exception to the general rule in *Fairbanks* v. *United States*, *supra*, to a conviction for transportation of a motor vehicle knowing it to have been stolen). No rule would require suppression of all mention of appellant's having a car at the gas station in addition to the Chevrolet, and at no time did appellant seek to keep the identity of the second car from the jury.

precluded on appeal. F.R. Crim. P. 30; *Dukes* v. *United States,* 107 U.S. App. D.C. 382, 278 F.2d 262 (1960); *McAllister* v. *United States,* 99 U.S. App. D.C. 256, 239 F.2d 76 (1956).

Nor can F.R. Crim. P. 52(b) be used to resuscitate the issue. The charge must be read as a whole, *Askins* v. *United States,* 97 U.S. App. D.C. 407, 231 F.2d 741, *cert. denied,* 351 U.S. 989 (1956); *Kinard* v. *United States,* 69 App. D.C. 322, 101 F.2d 246 (1938). A jury will not be deemed to have disregarded the court's instructions. *Delli Paoli* v. *United States,* 352 U.S. 232 (1957).

The court's instructions that appellant's possession of the recently stolen auto, if unexplained, could be a proper predicate to a guilty verdict were clearly correct (Tr. 113-114). *McKnight* v. *United States,* 114 U.S. App. D.C. 40, 309 F.2d 660 (1962); see *Bray* v. *United States,* 113 U.S. App. D.C. 136, 306 F.2d 743 (1962). The jury was also instructed that the government affirmatively must prove that "appellant *knew* that he did not have the consent of the owner to use, operate or remove the vehicle," and that to this end it must be shown that appellant "drove or used the vehicle *knowing* that he had no authority to do so" (Tr. 112-113, emphasis supplied). It is inconceivable that the jury would not be aware from the foregoing that the bona fide belief claimed by appellant that he had proper authority to use the car would negate the required element of guilty knowledge, and require acquittal if believed. It is impossible that the jury would not understand that such an explanation of possession was lawfully satisfactory, in view of the elements of the crime as described by the court, especially viewing the instructions as a whole (Tr. 106-114). That defense trial counsel was not moved to suggest any corrections after hearing all the evidence, arguments and instructions militates against appellant's present contention that the issue was not clearly presented to the jury.[4]

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[4] Similarly, instruction designed to neutralize witness William H. Smith's remark that appellant "stole—I mean he took the car" was never requested. The statement came out on cross-examination by defense counsel (Tr. 54). Agreeably a mistrial was not warranted

III. Variance between indictment and proof as to persons having custody of the car at the time of the theft did not impair substantial rights of the accused.

(See the Indictment)

> "Variance as to ownership [between the indictment and proof] has not the importance in federal criminal procedure which it had at common law. It now spoils a trial only when the substantial rights of the accused are impaired; and his rights to a correct accusation are generally said to be to have sufficient information as to the charge against him, and protection against being again placed in jeopardy." *England* v. *United States*, 174 F.2d 466, 468 (5th Cir. 1949), citing *Berger* v. *United States*, 295 U.S. 78 (1935).

Appellant asserts that absence from the indictment of the names of the two parking lot attendants who were last in contact with the car before the theft was a fatal defect precluding prosecution. It is submitted that it was not raised below, and should not be noticed on this appeal. F.R. Crim. F. 52(a).[5]

Very obviously appellant could not be placed again in jeopardy on account of his use of the Chevrolet; a crime therein is stated and "[t]he facts proved at the trial clearly

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(Br. 18). But available to counsel below was (1) a motion to strike; (2) an immediate instruction to the jury to disregard; and (3) admonition during the final charge to disregard the remarks. None of these was sought, perhaps for the sound tactical reason that the remark did not strike the jury with sufficient impact to warrant calling it specifically to their attention. It is hard to generate an argument that the fleeting conclusion could have been prejudicial, especially since it did not imply some peculiar knowledge available to the witness but not adduced by him for jury consumption. Smith's conclusion—as well might have been the jury's—was adequately predicated on what he saw at the service station, and in view of the strong government case, was harmless.

[5] F. R. Crim. P. 52(a): Any error, defect, irregularity or *variance* which does not not affect substantial rights shall be disregarded (Emphasis supplied).

related to those charged in the indictment." *Pependrea* v. *United States*, 275 F.2d 325, 328 (9th Cir. 1960); Epps *v. United States*, 81 U.S. App. D.C. 244, 157 F.2d 11 (1946).

Nor has appellant made the required showing that because of the variance he was "embarrassed in making his defense". *Epps* v. *United States, supra* at 245, 157 F.2d at 12. His defense at trial was that he borrowed the car from a friend, a tale which had nothing to do with the parking lot custodians. Further, appellant can only theorize that the variance "may well have hindered" preparation for trial on the grounds he "might well have wished" to investigate the other custodians (Br. 16). The most cursory initial investigation of William H. Smith and the lot—both as mentioned in the indictment—would have indicated the role of Smith's two subordinates. And had the suggested impairment been a real impediment, unquestionably defense counsel—alerted to the possibility of defect by the dismissal of the first count of the indictment—would not have omitted mention of it below.

CONCLUSION

Wherefore, it is submitted that the judgment of the court below should be affirmed.

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